

F O R P U B L I C A T I O N

I N T H E S U P R E M E C O U R T O F T E N N

A T N A S H V I L L E

T A M M Y R . G A N Z E V O O R(T ,
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P l a i n t i f f - A p p e l l a n t ,
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(S u m n e r C i r c u i t
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R I C H A R D B . R U S S E L L (, M A R T H A T .
R U S S E L L , A N D J I M C(A S S E T T Y d / b / a
J I M C A S S E T T Y R E A L T(Y ,
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D e f e n d a n t s - A p p e l l e e s .

F o r P l a i n t i f f - A p p e l l a n t D e f e n d a n t s -
M i c h a e l W . E d w a r d s J o h n R . B r a d l e y
H e n d e r s o n v i l l e H e n d e r s o n v i l l e

O P I N I O N

J U D G M E N T O F C O U R T O F A P P E A L S
A F F I R M E D ; J U D G M E N T O F T R I A L C O U R T
R E V E R S E D . R E I D , J .
T h i s c a s e p r e s e n t s f o r r e v i e w

Court of Appeals reversing the trial action for violation of the Tennessee Act¹ brought by the purchaser of residence against the seller and the seller's son. The Court of Appeals dismissing the suit.

I

The subject of this suit is a house in Hendersonville, Tennessee, which defendants Richard Russell and Martha property was occupied as a residence in 1991, when Martha Russell moved in divorce. Richard Russell and his children lived in the premises until a short time prior date on which the property was conveyed to Tammy R. Ganzenvoort.

In the latter part of 1992, the house was listed for sale with Jim Cassettty Real Estate Agency owned by the defendant Jim Cassettty and his wife, Pat Cassettty, who is represented by real estate agent

¹Tenn. Code § 57-1-101 to 47-1-5002

²The Court of Appeals dismissed the suit from which there is no appeal.

Cassetty is not related to Jim and

On February 1, 1993, the party
contract for the sale of the property
closing was set for May 31, 1993.
approval by the United States Depar-
Development of a Federal Housing Au-
F.H.A. required an inspection by a
agency, an appraisal by an appraiser
a professional termite inspection.

The F.H.A. inspection revealed
minor repairs but did not mention the
suit is based. Those repairs were

The real estate appraiser app-
inspected the property in the proce-
appraisal. During that inspection,
underpinning but found no defects
subflooring. He only required the
knowledge of a sump pump located be-
it be in working condition. A copy
was given to the purchaser on May 1
prior to the closing.

An employee of a pest control inspection of the house on May 25, there was no evidence of termite infestation. Termite inspector did, however, find bathroom, which he verbally reported testified:

It wasn't a problem that I normally put on this report since it was the deterioration of subflooring under the bathroom main bathroom of the house. A took note of that as I was inspecting . . .

When I went under the bathroom I see that the subflooring was damaged. It was obviously moisture damage. It looked to me, and I've looked at them, it looked like a drain trap. It wasn't dripping water. It was something where maybe when the commode was flushed or when the bathtub was drained or the shower whatever, was getting in there and damaging the wood.

Since there was no structural damage, that's the reason I didn't put it on my report. But I did report it to the Cassette agency. I do this as a courtesy. If I find a plumbing or anything like that under a usually tell the agent so they can get it repaired.

. . .

It was obvious there had been water at some time and that it damaged the subflooring, but not the floor joists themselves. So it

structural, and that's why I did it on my report.

The termite inspector told an employment agency, "Look, there's no problem with it. By the way, though, tell Jim that something under the bathroom has been damaged like a drain leak because there is now."

Apparently, the termite inspector Jim Cassetty was out of town. Jim

Well, I come back from being in town and had a report from the Pest Control that they had inspected the property and issued the letter recommended that the exterior, underside of the property under bathroom be refurbished, renovated strengthened.

I talked to [the termite inspector] about that. He suggest[ed] lamination scabbing -- I understand lamination being a plank on each side of - or scabbing where you put only one. I informed [the termite inspector] [the carpenter]. would do that

. . . . I went out there and the area, and then I hired a man Bob Murdock to repair it. Mr. was out of town, I contacted him what the requirement was, that there was going to be some so to make the repairs. He asked [me] to go ahead and have it f

d i d s o .

. . . .

W e l l , i t l o o k e d l i k e a n o l d
I t l o o k e d l i k e i t w a s s o m e t h i n g
h a p p e n e d f i v e o r 1 0 y e a r s e a r l y .
I t h o u g h t i t w a s j u s t p r e c a u t i o n .
Y o u s t a r t t a k i n g u p c a r p e t a n d
b a c k p a n e l i n g a n d t a k i n g o f f a
p r o t e c t i v e p a p e r , i t w a s n ' t v i

T h e c a r p e n t e r d e s c r i b e d t h e c o
t h e r e p a i r s m a d e :

t h e r e w a s o n e j o i s t t h a t w a s i
b a d s h a p e . I p u t a 2 x 1 0 o r
o n t h e b l o c k w a l l o n t h e o u t s i d e
h o u s e , r a n i t b a c k 3 o r 4 f e e t
g o o d e n d o f t h e j o i s t . A n d t h e
f l o o r u p t h e r e , i t w a s a l i t t l e
d i s c o l o r e d , I b r o u g h t i t a r o u n d .
I t w a s d r y a n d s t i l l f i r m a n d
p u t s o m e p l y w o o d u p a g a i n s t t h e
t w o j o i s t s o n b o t h s i d e s o f
s p l i c e s o n t h e m .

T h e n I h a d t o k i n d o f p u t p
o n i t t o j a c k i t u p t o m a k e s u
e v e r y t h i n g w a s u p t i g h t a g a i n s t
f l o o r . I w e n t i n s i d e t o m a k e
w a s n o c r a c k s o r a n y t h i n g i n t
t h e t i l e i n t h e b a t h r o o m . E v e
r y t h i n g i n t a c t . I t w a s f i n e . E v e
r y t h i n g d r y .

P r i o r t o c l o s i n g , t h e s e l l e r ' s
b u y e r ' s a g e n t , a c c o r d i n g t o t h e t e s

" T h e r e w a s a p i e c e o f w o o d r e p

underneath the house, but don't about it. It was just a little piece of wood. Jim said under house everything is fine." An tell [the plaintiff] that.

I said that there is a clea letter; there was a piece of w replaced; they're saying every fine, he went under it. But the sawdust out there, and I s that must explain the sawdust.

Pat Cassetty's version of the discuss

As I explained it, it was termite fellow had told us tha some damage there. He had jus said there was some damage the we'd check it out when we came Mr. Russell wanted everything for the house. We did what we was the proper thing to do. T incurred was put on the closin statement, so I was telling th found this at the last moment had corrected and this was the

There is no evidence that Russ information about the defects other Cassetty and the carpenter. Russell work recommended and agreed that th be charged to him at the closing.

Even though the plaintiff and the house several times prior to cl

not see any indication that the buyer
The plaintiff if did not discuss the condition
with the seller prior to closing.
that she relied upon her personal inspection
report, and the termite letter. She
relied upon any representation made by the
seller's agent.

After all the reports required
filed, that agency issued its approach
collateral for the plaintiff's loan.

After the sale had been closed
discovered, upon removing the carpet
the bathroom, that a section of the
approximately 3 feet by 3 feet in area
inspection revealed that water leakage
commode had caused extensive damage
where the repairs had been made and
floor joists under the adjoining dining room.

An engineer engaged by the plaintiff
condition as follows:

The carpet that had gotten
[the] dining room had been pulled

and there was a hardwood floor
the carpet. Within 3 or 4 feet
wall that hardwood was very ba-
damaged, in some cases comple-
decomposed; so the damage had
on for some time.

There was no evidence, in the
bathroom, of any deterioration
time, from looking inside the
but going underneath the house
crawl space the floor joist had
damaged by the water. The ply-
subfloor had completely delaminated
bonding between the layers of
were separated.

The floor joists were very
had decayed somewhat; and some
gone in at some previous time,
know when, and tried to repair
joist by splicing four pieces
onto the sides of the joist.

When asked by the judge whether they
have discovered this problem, the

. . . The rotted hardwood was
carpet, wall-to-wall carpet, as
the floor would have felt a little
but that would have been a pre-
extensive inspection, to go around
poke your fingers along the wa-

The tile in the bathroom is
cracked, so there wouldn't have
clue in there.

Underneath the house would
the only hope of finding this
even though there was foil paper
the plywood, the foil does not
floor joist, and there was evidence
water stain and mildew on the
would have been enough to at least

s u s p e c t t h e r e w a s a l e a k a g e p r

D e f e n d a n t J i m C a s s e t t y e s t i m a t
c o u l d b e r e p a i r e d f o r n o t m o r e t h a n
e x p e r t s u b m i t t e d a b i d t o r e p a i r t h
\$ 7 , 0 0 0 .

T h e t r i a l c o u r t m a d e n o s p e c i f
I t r u l e d a s f o l l o w s :

T h e C o u r t i s c o n v i n c e d t h a t t h
D e f e n d a n t s w e r e g u i l t y o f u n f a
d e c e p t i v e a c t s o r p r a c t i c e s a n
t h e p r o v i s i o n s o f T . C . A . § 4 7 -
1 0 4 (b) (2 7)

T h e C o u r t o f A p p e a l s a f f i r m e d
t h e d e f e n d a n t s R u s s e l l a n d J i m C a s
u n f a i r o r d e c e p t i v e a c t s . I t h e l d
d e c e p t i v e a c t b y , e i t h e r i n t e n t i o n a
c o v e r i n g o v e r a s e r i o u s d e f e c t i n t
c o n c l u d e d , h o w e v e r , t h a t t h e d e c e p t
o f a n y d a m a g e s a n d r e v e r s e d t h e j u d
c o u r t .

II

The standard of review is stated in the Tennessee Rules of Appellate Procedure:

Unless otherwise required by statute, review of findings of fact by court in civil actions shall be upon the record of the trial accompanied by a presumption of correctness of the finding, unpreponderance of the evidence otherwise.

When the trial judge has failed to state the facts, this Court will review the record for preponderance of Selke v. Tennessee, 806 S.W.2d 806, 808 (Tenn. 1975). Further, if the statute and application of the question of law are in question, the court with no presumption of correctness, Corporation v. Hud8d5l4e sSt.own. 858 S.W.2d 906, 907 (Tenn. 1993).

III

Resolution of the issues presented in construction of the Tennessee Constitution, construing the statute, this Court effect to the legislative intent and

the language of Cahsostreek. Vaca tio
Inc. v. Dept., 865 R S v N 2 d 1 , 2 (Tenn)
Additionally, "[t]he Tennessee Cons
be liberally construed to protect c
those who engage in deceptive acts
Morris v. Mack' s 2 U S S d W C a d s 5 3 8 , 5 4 0
Tenn. Code Ann. § 47 - 18 - 102 (2) (199

The Act was enacted "to protec
legitimate business enterprises fro
unfair or deceptive acts or practic
trade or commerce . . . , [t]o encou
development of fair consumer practi
declare and to provide for civil le
ethical standards of dealing betwee
business and the consuming public t
dealings between buyers and sellers
be had in this state . . ." Tenn.

The Act authorizes a private c

Any person who suffers an asc
of money or property, real, pe
mixed, or any other article, c
thing of value wherever situat
of the use or employment by an
an unfair or deceptive actor or
declared to be unlawful by thi
bring an action individually t

actual damages.

Tenn. Code Ann. § 47-18-109(a)(1) (

This Court has discussed issue only three ~~Masse~~s v In Mack' s 2~~ss~~sdwca 538 (Tenn. 1992), the seller sold this. " The seller knew it was a reconstructed reduced the vehicle's 50 percent. The seller's defense contained in the bill of sale protected under the Act. This Court ruled the Code (U.C.C.) imposes an obligation performance of every contract which and that disclaimers permitted by the do not defeat separate causes of action. Protection Ind Aactt .539. The court stat

To allow the seller here to avoid liability for unfair or deceptive practices by disclaiming contractual warranties under the U.C.C. would contravene the broad remedial the Consumer Protection Act.

Id .at 540 .

InQuality Auto Parts Co. v. Bl

8 7 6 S . W . 2 d 8 1 8 , 8 1 9 (T e n n . 1 9 9 4) , t
d i d n o t n e e d t o r e a c h t h e i s s u e o f
p r o t e c t i o n l a w s a p p l y t o d i s p u t e s a
e m p l o y e r - e m p l o y e e r e l a t i o n s h i p s . T
a l l e g e d f a l s e s t a t e m e n t s a b o u t t h e
d i s p a r a g e t h e q u a l i t y o f t h e p l a i n t
t h e r e f o r e w o u l d n o t s u p p o r t a c l a i m

I n P u r s e l l v . F i r s t A m e , r i 9 c 3 a 7 n N a
S . W . 2 d 8 3 8 , 8 3 9 (T e n n . 1 9 9 6) , t h e C
d e f e n d a n t b a n k ' s b r e a c h o f a n a g r e e
a r e p o s s e s s i o n d i s p u t e , d i d n o t f o r
u n d e r t h e A c t b e c a u s e t h e a c t i o n s o
t h e c o n d u c t o f a n y " t r a d e o r c o m m e r

T h i s h o l d i n g i s c o n f i n e d t o
f a c t s a n d c i r c u m s t a n c e s o f t h i s
w e d o n o t , b y t h i s O p i n i o n , g e
e x e m p t b a n k i n g a c t i v i t i e s f r o m
T e n n e s s e e C o n s u m e r P r o t e c t i o n

I_d a t 8 4 2 .

T h e A c t i s a p p l i c a b l e t o t h e t
c a s e . T h e p l a i n t i f f i s a c o n s u m e r
p u r c h a s e o f r e a l p r o p e r t y i s c o v e r e
p r o p e r t y w a s o f f e r e d f o r s a l e b y a

the real estate trade. The term "c
Act, and in pertinent part states,
natural person who seeks or acquires
. . . property . . . real, personal
Tenn. Code Ann. § 47-18-103(2) (1995)
"trade" and "commerce" in pertinent
"'Trade,' 'commerce,' or 'consumer'
. . . offering for sale . . . of a
real, personal, or mixed . . ."
103(9) (1995). Consequently, the co
action against the defendant Jim Ca

However, whether the Act is ap
by the defendant Russell, who is no
sale of real property, is less clear.
purposes of the Act are to maintain
dealing between engaged and protect consumers and
public," and to protect consumers and
enterprises from those who engage in
or practices conduct of any" and protect consumers and
Code Ann. §§ 47-18-102(2) & (4) (1995).
Although this language does not expressly
Act sellers not in the business of
or brokers, a reasonable construction

includ³d .

Some consumer protection acts jurisdiction, clearly apply only to solicit or engage in consumer-to-consumer sales transactions outside the state's scope, and not an attempt to keep consumer-to-consumer sales transactions outside the state's coverage. In particular, even though a court may dismiss homeowner as a . . . defendant, against the homeowner's real estate inspector should go forward.

A number of state courts have held that, even where real estate is generally covered, the isolated sale of real estate by a nonmerchant is covered. This should be viewed as an attempt to keep consumer-to-consumer sales transactions outside the state's coverage. In particular, even though a court may dismiss homeowner as a . . . defendant, against the homeowner's real estate inspector should go forward.

Jonathan Shadron and Deceptive, A5c1t s (3d ed. 1991) (footnote omitted) and Sav., B6n3k8 A. 2d 165, 170 (N.C. 1990).

³Although the Court later in this opinion of the District Court, U.S. d5e6r3w oFood Supp. 335, Tennessee, 1982, 709 F.2d 1504 (6th Cir. 1983), reached a conclusion on this issue.

' homeowner's exception' exists, its
an individual involved in the sale
residence Rebereson, v3.6 3B oSy.dE . 2 d 672 , 6
App. 1988) ("private parties engaged
residence, were not involved in tra-
be held liable under the statute.
termite inspector] were engaged in
the meaning" of Bershadet v. Moon 1166,
1168 (N.J. Super. A.D. 1986)
a response only to the public harm
deception, misrepresentation and un-
engaged in by professional sellers
of many types of consumer goods'.
isolated sale of a single family re-
Young v., 35 A.2d 857 , 860 (Del. Su-
not believe that the isolated sale of
. . . constitutes the conduct of tr-
conclusion is that the Act is not a
this case.

The next question is whether the trial court's conclusion that committed an unfair or deceptive act meaning of the Act. The claim in the following provisions of the Act:

. . . the following unfair or acts or practices affecting the of any trade or commerce are declared unlawful and in violation of part:

(27) Engaging in any other act practice which is deceptive to consumer

Tenn. Code Ann. § 47-18-104(b) (1995) define the terms "unfair" and "deceptive" heretofore defined these terms.

The Act states that in determining intended meaning the court should look to a similar provision in the Federal Tenn. Code Ann. § 47-18-115 (1995). It noted that the terms "unfair" and "deceptive" are of close definition:

It is important to note the general standards of illegality; proscriptions in § 5 are flexible defined with particularity by of cases from the field of business.

Federal Trade Comm. v., Case No. 384-85, 85 S. Ct. 1035, 1042, 13 L.

⁴See 15 U.S.C. § 45(a)(1) (1973) ("Unfair methods of competition, and unfair or deceptive acts or practices declared unlawful . . .").

Federal Trade Comm. v. Motion Picture Co., 344 U.S. 392, 394, 73 S.Ct. 36 (1953). Without limiting the broad following definitions found in decisional jurisdiction clearly are applicable Supreme Court of Vermont has held that practice' is a material representation likely to mislead a reBaissosnoanb lye. cWoanrs 628 A.2d 1256, 1261 (Vt. 1993). A foundCoinnnor v. Merrill Lynch Re Eliz 196, 202 (Ill. App. 1991): "a concealment, suppression or omission with intent that others rely upon the suppression or omission of such material

InKlotz v. UndeBwood Supp. 335 1982a)f,f,' d709 F.2d 1504 (6th Cir. 1988) the sale was an old house to which made. Subsequent to the sale, the removing a portion of a wall, water appurtenances of the house. The Tennessee Consumer Protection Act in the seller had no knowledge of the an inspection by the purchaser would information known by the seller.

Brokers, agents and other prof
real property have knowledge and in
quantity and quality to that of an
purchaser regarding factors and con
value of the property they are offe
obligated by the Act to exercise go
prospective purchasers material fac
the property known to them and not
ascertainable by a prospective purc
duty, however, will be determined by
circumstances of each situation, in
the parties, and the generally acce
standards in the trade. The Act do
liability. Nor does it impose upon
those which are generally accepted
practice. The provisions of Tenn.
66-5-210 (Supp. 1996) (residential
though not determinative, may be re
after its enactment in 1994. Likewise
Real Estate Brokers License Act, Te
to 62-13-322 (1990 & Supp. 1996), m
determining good practice.

Tested by this standard, the e
that the defendant realtor is guilty

acts. The realtor undertook to bring requirements. Other small deficiencies in inspector were repaired. When advised in inspector of the damage under the buyer engaged a carpenter and instructed approval, to repair the damage unknown to the purchaser's agent, a little note of it. None of the parties water damage had extended to the dining room was not noted by the F.H.A. inspector appraiser, both of whom inspected the expert employed by the plaintiff to determine if the damage would have required one to "the walls," and that there was no "leak in the bathroom. He stated that only under enough indication to suspect a leak was essentially hidden from all inspection occurred after the sale with the repair covering in the affected area. Appraiser several persons whose professional premises felt that removal of the ceiling. Those persons included the F.H.A. appraiser, the termite inspector, a

The conclusion is that the evidence

against the finding that the defendant
an unfair or deceptive act within t

For these reasons, the judgment
Appeals reversing the trial court is
remanded to the Circuit Court of Su

Costs on appeal are taxed to t

REID, J.

Concur:

Birch, C.J., and Drowota, J.